

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ELVIA M. RIVERA)	
Claimant)	
VS.)	
)	Docket Nos. 259,993, 259,994,
IBP, INC.)	262,024 & 262,025
Respondent)	
Self-Insured)	

ORDER

Claimant appeals the June 28, 2004 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded a permanent partial general disability based upon her 18 percent whole person functional impairment for the injuries suffered through the stipulated date of November 2, 1999. Claimant was, however, denied any work disability under K.S.A. 1999 Supp. 44-510e after the Administrative Law Judge (ALJ) determined that claimant failed to put forth a good faith effort to retain her job with respondent after being offered an accommodated position, which claimant refused to attempt. The Appeals Board (Board) heard oral argument on November 30, 2004.

APPEARANCES

Claimant appeared by her attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent, a self-insured, appeared by its attorney, Gregory D. Worth of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, at oral argument before the Board, the parties agreed that based upon claimant's stipulated average weekly wage of \$447.02, claimant's temporary total disability rate would be \$298.03. Therefore, the Award of the ALJ will be modified to reflect the appropriate temporary total disability rate when computing the award.

ISSUES

What is the nature and extent of claimant's injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds the Award of the ALJ should be modified to show the appropriate temporary total disability rate, but affirmed in all other respects.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant suffered a series of injuries to numerous parts of her body, including her upper and lower back, neck, right knee, shoulders, elbows and hands.¹ She received medical treatment in the form of medication and therapy and also underwent surgery on her knee under the hand of Jeffrey T. MacMillan, M.D., a board certified orthopedic surgeon. Claimant continued working for respondent while undergoing treatment with numerous health care professionals. Claimant's last day worked for respondent was September 10, 2000, when respondent advised they did not have work within her restrictions. However, shortly thereafter, respondent determined that they did have a job within the restrictions placed upon claimant by Dr. MacMillan and advised her by letter dated October 10, 2000, that the job was available and that claimant was to report no later than 3:00 p.m. on Tuesday, October 17, 2000.

Claimant appeared at respondent's plant at approximately 3:45 p.m. on October 17 and attended a meeting with Rodger Brownrigg, the personnel manager. At that time, she advised Mr. Brownrigg that the job which was offered on second shift would not work as she was unable to work a second shift job. She was advised by Mr. Brownrigg that she could work the second shift job until an opening on first shift became available, at which time she would be allowed to bid into a first shift job based upon her seniority. Claimant continued to refuse to attempt the job, even though being advised it was within the restrictions placed upon her by Dr. MacMillan and paid a comparable wage.

Respondent did provide a job description to Dr. MacMillan, showing the requirements of the job. After reviewing the job description, Dr. MacMillan advised that the

¹ The parties stipulated to a date of accident of November 2, 1999. They further stipulated that claimant's multiple injuries could be consolidated into one award.

position, which was titled “pick lean from bone belt,” was within the restrictions placed upon claimant by Dr. MacMillan.

The ALJ, after reviewing the evidence and testimony, determined that claimant’s refusal to attempt the job displayed a lack of good faith. The ALJ made note of the fact that at regular hearing, claimant denied being offered the job by respondent. However, the written memoranda attached to the deposition of Mr. Brownrigg, and marked as Brownrigg Exhibits 3 and 4, show a specific offer of employment was made to claimant at a job which paid a wage comparable to that which she was earning at the time of her accident and was within the restrictions placed upon claimant. The ALJ, citing *Foulk*,² noted that claimant was required to mitigate a work disability claim by at least attempting to work in a job which was offered at a comparable wage so long as it was within claimant’s restrictions. The failure by claimant to do so necessitated a finding of a lack of good faith. The ALJ, citing *Copeland*,³ imputed to claimant the wage which had been offered by respondent, which was a wage comparable to that she was earning at the time of the stipulated date of accident of November 2, 1999. Therefore, pursuant to K.S.A. 1999 Supp. 44-510e, claimant was limited to her functional impairment.

The Court went onto adopt the functional disability opinion of Peter V. Bieri, M.D., board certified in disability evaluations. Dr. Bieri had been appointed by the ALJ to perform an independent medical examination on May 23, 2003. After discussing claimant’s various symptoms and reviewing a large number of medical records, and performing a physical examination, Dr. Bieri determined that claimant had an 18 percent whole person functional impairment pursuant to the American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The Board, in reviewing the file, agrees with the ALJ and finds Dr. Bieri’s functional impairment opinion to be the most credible and adopts same as its own.

The Board, therefore, finds that the Award of the ALJ should be affirmed with the exception that the temporary total disability rate shall be modified as above noted.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated June 28, 2004, should be, and is

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

hereby, modified with regard to the temporary total disability rate above noted, but affirmed in all other regards.

Therefore, in accordance with the above findings, an award is made in favor of the claimant, Elvia M. Rivera, and against the respondent, IBP, Inc., a qualified self-insured, for injuries suffered through the stipulated accident date of November 2, 1999, and based upon a stipulated average weekly wage of \$447.02 for an 18 percent permanent partial impairment to the body as a whole on a functional basis.

Claimant is awarded compensation in the form of temporary total disability compensation for 0.57 weeks at the rate of \$298.03 per week in the amount of \$169.88 and 74.7 weeks permanent partial disability compensation at the rate of \$298.03 in the amount of \$22,262.84, for a total award of \$22,432.72, all of which is due and owing at the time of this award and ordered paid in one lump sum, minus any amounts previously paid.

In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of December 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director